

DECISION



118453
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-203564

DATE: May 25, 1982

MATTER OF: Turner-Caldwell - Reconsideration in view of
Wilson v. United States

- DIGEST:**
1. Our Turner-Caldwell decisions granting retroactive temporary promotions for overlong details are reconsidered in light of Court of Claims decision in Wilson v. United States which reaches opposite result. Although GAO is not bound by decisions of Court of Claims, the Wilson decision is a reasonable interpretation of law and regulation, it follows a clear line of precedent by the court, and it is consistent with the views of the Department of Justice and the Office of Personnel Management. Therefore, we will follow the Wilson decision and deny all pending and future claims under our Turner-Caldwell line of decisions.
 2. Decision to overrule Turner-Caldwell decisions is prospectively effective and affects only pending and future claims. Prior decisions or claim settlements issued before date of this decision pursuant to Turner-Caldwell line of decisions will not be disturbed.

The issue in this decision is the impact of the Court of Claims decision in A. Leon Wilson v. United States 1/, denying a temporary promotion for an overlong detail on our Turner-Caldwell decisions which grant temporary promotions for overlong details. For the reasons stated below, we have decided to adopt the Wilson decision and no longer follow our Turner-Caldwell decisions as they apply to all pending and future claims.

1/Ct. Cl. No. 324-81C, Order, Oct. 23, 1981.

This decision is in response to a request from the Department of Justice for our comments on the Wilson decision and on its impact on our Turner-Caldwell decisions. We have also received comments on this question from the Office of General Counsel, Office of Personnel Management (OPM).

BACKGROUND

Our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), represented a departure from prior decisions of our Office regarding the entitlement of employees to temporary promotions where they have been detailed to higher level positions for more than 120 days without the prior approval of the Civil Service Commission (now Office of Personnel Management). See 52 Comp. Gen. 920 (1973). Our Turner-Caldwell decisions allowing temporary promotions under such circumstances followed a decision of the Board of Appeals and Review, Civil Service Commission, dated April 19, 1974, which held that the remedy expressed in the Federal Personnel Manual for an agency's failure to obtain prior Civil Service Commission approval to extend a detail was a temporary promotion for the employee.

Recently, the Court of Claims decided A. Leon Wilson v. United States, Order, Oct. 23, 1981. The plaintiff had sought a retroactive temporary promotion and backpay for an alleged higher level detail based upon our Turner-Caldwell decisions. The court denied the plaintiff's claim in Wilson by relying upon prior decisions where it had denied relief for overlong details. Salla v. United States, Ct. Cl. No. 623-80C (Order, Jul. 2, 1981); Goutos v. United States, 212 Ct. Cl. 96, 98, 552 F.2d 922, 924 (1976); Peters v. United States, 208 Ct. Cl. 373, 376-380, 534 F.2d 232, 234-236 (1975). In addition, the court in Wilson addressed our Turner-Caldwell decisions but declined to follow them, stating that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details. The court likewise found no entitlement under the Back Pay Act, 5 U.S.C. § 5596.

In comments we received from OPM, that office contends that there is no statute or non-discretionary administrative regulation by OPM requiring a constructive promotion for an

employee detailed to a higher level position for more than 120 days without prior OPM approval. Therefore, in the absence of a nondiscretionary provision to temporarily promote, OPM believes there is no entitlement to relief under the Back Pay Act, 5 U.S.C. § 5596. In addition, OPM believes that the amendments to the Back Pay Act do not ratify our Turner-Caldwell decisions.

DISCUSSION

Our reading of the Wilson decision indicates that the Court of Claims, at least impliedly, has overruled the decision of the Board of Appeals and Review which was the foundation for our Turner-Caldwell decisions. The Board's decision did not rely upon mandatory language in the Federal Personnel Manual requiring temporary promotions for overlong details. Instead, the Board's decision looked to the mandatory requirement to seek prior Civil Service Commission approval to extend a higher grade detail beyond 120 days. The decision applied the remedy of a temporary promotion for the detailed employee where the agency failed to take the necessary action. Our Turner-Caldwell decisions concurred with the Board's interpretation of the applicable provisions of the Federal Personnel Manual.

The Court of Claims has ruled in Wilson that neither the statute nor the Federal Personnel Manual requires the granting of a temporary promotion for an overlong detail and that the absence of a mandatory provision granting the temporary promotion defeats the employee's entitlement under the Back Pay Act. Since our Turner-Caldwell decisions reached an opposite conclusion, we must resolve the conflict.

Traditionally, our Office has given careful consideration to decisions of the Court of Claims, but we have also held that we are not bound by decisions of that court. See 50 Comp. Gen. 480, 486 (1971); 45 id. 700, 707-708 (1966); 31 id. 73 (1951); and 14 id. 648 (1935). As we held in 14 id. 648, at 652-653, where we believe the issues have not been fully and faithfully presented to the court or where the court's decision represents a broad departure from long-standing administrative interpretation of law as might occur in settlement of a claim, we have exercised our prerogative not to consider the court's interpretation binding as to claims before our Office. See also 50 Comp. Gen. 480, supra.

The decision by the Court of Claims in Wilson does represent a departure from our Turner-Caldwell decisions, but it is consistent with the views of the Office of Personnel Management and the Department of Justice. Furthermore, the Wilson decision follows a clear line of precedent by the court in such cases. See Salla v. United States, supra, Goutos v. United States, supra, and Peters v. United States, supra.

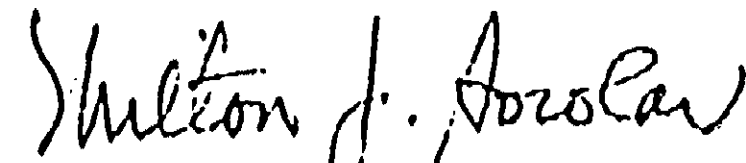
We must concede that the court's interpretation of the statute and regulations governing details is a reasonable interpretation. Furthermore, the court in Wilson has rendered a clear statement on overlong details with knowledge of our Turner-Caldwell decisions. Thus, we are unable to conclude that the Wilson decision falls within that narrow category of decisions which we are constrained not to follow. We will, therefore, follow the court's decision in Wilson in all pending and future claims before our Office involving overlong details.

Since our decision of today represents a changed interpretation of law, we will limit the decision to prospective application. Prior decisions and settlements of claims by our Office or other Federal agencies which were made pursuant to our Turner-Caldwell decisions will not be disturbed. However, claims which arose or were filed prior to the Wilson decision and which have not been decided must be denied. See, for example, 56 Comp. Gen. 551 (1977), amplified in 58 Comp. Gen. 345 (1979).

With regard to the Back Pay Act, we note that the court in Wilson and in other detail decisions again stressed that without an actual reduction or withdrawal of pay or allowances there is no remedy under the Back Pay Act. However, our decisions beginning with 54 Comp. Gen. 312 (1974) adopted a more liberal interpretation of the Back Pay Act, holding that a failure ("omission") to carry out a nondiscretionary agency regulation or policy resulting in a denial of pay or allowances also constituted an unwarranted or unjustified personnel action. We held to this interpretation despite dictum in the Testan decision (see 56 Comp. Gen. 427, at 430). Our interpretation was adopted by the Civil Service Commission in 1977 when it issued amended regulations implementing the Back Pay Act.

See 42 Fed. Reg. 16127, March 25, 1977, codified in 5 C.F.R. Part 550, Subpart H (1978). Furthermore, our interpretation of the Back Pay Act was ratified by the Congress through the amendments to the Back Pay Act contained in the Civil Service Reform Act, Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1216. The key language that was added to the Back Pay Act appears in subsection (b)(3) which states, in part, that a "'personnel action' includes the omission or failure to take an action or confer a benefit." 5 U.S.C. § 5596(b)(3) (Supp. III 1979). See also S. Rep. No. 95-969, 95th Cong., 2nd Sess. 114 (1978).

The amended Back Pay Act does not, however, modify or overrule the basic premise in Wilson that no statute or regulation requires a temporary promotion incident to an overlong detail. In our opinion, the amendments to the Back Pay Act merely ratify our interpretation that there is a remedy for the failure to confer a benefit pursuant to a nondiscretionary provision of law, regulation, or collective-bargaining agreement. The Office of Personnel Management shares that view in its comments to our Office on this matter.

for 
Comptroller General
of the United States